2005

The State of Utah v. David Carl Reed : Brief of Appellant

Utah Court of Appeals

Lori J. Seppi; Lisa J. Remal; Salt Lake Legal Defender Association; Attorneys for Appellant.
Mark Shurtleff; Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DAVID CARL REED,	:	Case No. 20050670-CA
Defendant/Appellant.	:	Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Child Kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-301.1 (2003) and § 76-4-101 (Supp. 2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, presiding.

LORI J. SEPPI (9428)
LISA J. REMAL (2722)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DAVID CARL REED,	:	Case No. 20050670-CA
Defendant/Appellant.	:	Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Child Kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-301.1 (2003) and § 76-4-101 (Supp. 2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, presiding.

LORI J. SEPPI (9428)
LISA J. REMAL (2722)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
ISSUE AND STANDARD OF REVIEW	1
PRESERVATION OF ARGUMENT	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF CASE	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	10
ARGUMENT	
THIS COURT SHOULD REVERSE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT REED WAS GUILTY OF ATTEMPTED CHILD KIDNAPPING	11
CONCLUSION	24

Addendum A: Sentence, Judgment, and Commitment

Addendum B: Defendant's Motion to Dismiss Entered at Close of State's Case.

Addendum C: Constitutional Provisions, Statutes and Rules

TABLE OF AUTHORITIES

Cases

State v. Boyd, 2001 UT 30, 25 P.3d 985 ..... 12, 13

State v. Cantu, 750 P.2d 591 (Utah 1988) 19

State v. Chaney, 1999 UT App 309, 989 P.2d 1091 13

State v. Gonzales, 2000 UT App 136, 2 P.3d 954 11,12

State v. Gutierrez, 714 P.2d 295 (Utah 1986) 19

State v. Hamilton, 2003 UT 22, 70 P.3d 111 13

State v. Hickman, 779 P.2d 670 (Utah 1989) 19

State v. Holgate, 2000 UT 74, 10 P.3d 346 ..... 2, 12

State v. James, 819 P.2d 781 (Utah 1991) 12

State v. Johnson, 821 P.2d 1150 (Utah 1991) 17, 18, 22

State v. Kihlstrom, 1999 UT App 289, 988 P.2d 949 13

State v. Leleae, 1999 UT App 368, 993 P.2d 232 12

State v. Lemons, 844 P.2d 378 (Utah Ct. App. 1992) 19

State v. Long, 721 P.2d 483 (Utah 1986) 21

State v. O'Brien, 2003 UT App 419, 2003 Utah App. LEXIS 264 18

State v. Petree, 659 P.2d 443 (Utah 1983). 2

State v. Shumway, 2002 UT 124, 63 P.3d 94. 2

State v. Taylor, 818 P.2d 561 (Utah Ct. App. 1991) 13

State v. Workman, 852 P.2d 981 (Utah 1993) 12

Tillman v. Cook, 855 P.2d 211 (Utah 1993) 18

West Valley City v. Decker, 2000 UT App 97, 2000 Utah App. LEXIS 221 18

West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah Ct. App. 1991) 12

Statutes

Utah Code Ann. § 76-1-402 (2003) 23

Utah Code Ann. § 78-2a-3 (2002) 1

Utah Code Ann. § 76-2-103 (2003) 3, 20, 21

Utah Code Ann. § 76-4-101 (Supp. 2005) 1, 3, 17, 18, 19, 20, 21, 22, 23

Utah Code Ann. § 76-5-301.1 (2003) 1, 3, 17, 20, 21

Utah Code Ann. § 76-9-702.5 (2003) 23

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DAVID CARL REED,	:	Case No. 20050670-CA
Defendant/Appellant.	:	

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for one count of Attempted Child Kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-301.1 (2003) and § 76-4-101 (Supp. 2005), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002). See Addendum A (Judgment and Conviction).

ISSUE AND STANDARD OF REVIEW

Issue: Whether the trial court erred by ruling the State presented sufficient evidence to support a first degree felony conviction for attempted child kidnapping under Utah Code Ann. § 76-5-301.1 (2003) and § 76-4-101 (Supp. 2005).

Standard of Review: In sufficiency of the evidences cases, this Court will "review the evidence and all inferences which may reasonably be drawn from it in the light most

favorable to the verdict of the jury." State v. Shumway, 2002 UT 124,¶15, 63 P.3d 94. It "will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." Id. (citing State v. Petree, 659 P.2d 443, 444 (Utah 1983)).

> Notwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

Id. (quoting Petree, 659 P.2d at 444-45).

PRESERVATION OF ARGUMENT

Appellant David Carl Reed (Reed) preserved his argument that the trial court erred in ruling the State presented sufficient evidence to support a first degree felony conviction for attempted child kidnapping at R. 226:94-98 (motion to dismiss entered at close of State's case) (Addendum B); see State v. Holgate, 2000 UT 74,¶11,¶14, 10 P.3d 346 ("As a general rule, to ensure that the trial court addresses the sufficiency of the evidence, a defendant must request that the court do so.").

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following provisions are relevant to the issue on appeal. Their text is provided in full in Addendum C.

Utah Code Ann. § 76-2-103(1) (2003) – Culpable Mental State Definitions;

Utah Code Ann. § 76-4-101 (Supp. 2005) – Attempt;

Utah Code Ann. § 76-5-301.1 (2003) – Child Kidnapping.

STATEMENT OF CASE

Reed was charged by information with one count of Attempted Child Kidnapping, a first degree felony, in violation of Utah Code Ann. §§ 76-5-301.1 and 76-4-101. R. 1-3. A jury trial was held on February 2-3, 2005. R. 172-74; 223-24; 226-27. In his opening statement, Reed admitted he was guilty of "attempted lewdness upon a child," but argued he was not guilty of attempted child kidnapping. R. 226:16. He explained that he "did not open the car door. He did not tell [Ashley Poike (Poike)] in the demanding way or any other way to get in the car. His intentions were to expose himself to her, not to kidnap her, not to [seize] or confine or detain or transport her." Id. at 17.

At the close of the State's case, Reed "move[d] the Court to dismiss the case against [him] for insufficiency of evidence or lack of establishing a prima facie case." Id. at 94. He raised two arguments in support of his motion. Id. First, Reed argued the inconsistencies in Poike's statements established insufficiency of evidence. Id. at 94-95. Second, Reed argued that attempt "requires a substantial step be taken" and "even if taking the testimony of Ms. Poike in the light more favorable to the State, that that statement was made and the car door was opened, that I do not believe that that's a substantial step to the accomplishment of child kidnapping." Id. at 95-96. The trial court denied Reed's motion, holding Poike's credibility was a question for the jury, and Poike's testimony that Reed opened the car door and demanded that she "get in"

established "a substantial step towards the possibility of detaining her against her will or without any authority." Id. at 96-98.

The trial court instructed the jury as to the elements of attempted child kidnapping and attempted lewdness involving a child, the lesser-included offense. R. 157-58; 160. The trial court also instructed the jury as to the statutory definitions of intentionally and knowingly. R. 161. In Reed's closing argument, he argued Poike's testimony was not credible. R. 227:48-55. Regardless, her testimony that he "opened the car door and told her to get it" did not "constitute a substantial step towards accomplishing a child kidnapping." Id. at 56-57. Following deliberation, the jury found Reed guilty of attempted child kidnapping. R. 179; 227:72. On July 26, 2005, the trial court sentenced Reed to an indeterminate term of 3 years to life and granted credit for time served. R. 203-08. On August 2, 2005, Reed filed his notice of appeal. R. 209-10. On August 24, 2005, the Utah Supreme Court transferred Reed's case to this Court. R. 220.

STATEMENT OF FACTS

A. Evidence Presented By the State:

On August 12, 2004, twelve-year-old Poike was walking her dog west along the north sidewalk of 500 South. R. 226:22-23; State's Exhibit 7. She was walking to Franklin Elementary School. Id. at 23. In her testimony, Poike described her dog as a "pretty big" "golden retriever-mutt mix." Id. at 44, 48. She also described her encounter with Reed. Id. at 22-30. When she was walking past the Post Street Tot Lot Park, located on the northeast corner of Post Street and 500 South, she saw a four-door car parked across the street facing the same direction she was. Id. at 24-25, 33, 36; State's

Exhibit 7. There was one person in the car and he was sitting in the driver's seat. R. 226:25, 27. The passenger-side window was the only window rolled down. Id. at 34. The man in the car "yelled out, 'Hey,'" "lift[ed] himself up," and started "playing with" the zipper on his pants. Id. at 25, 33-34. When Poike saw this, she "got scared," "looked away," and "kept walking." Id. at 25-26, 35.

Poike walked past the Tot Lot Park, across Post Street, and "a bit" farther. Id at 36; State's Exhibit 7. As she walked, the man drove past her on the same side of the street as she was on and stopped at "the next corner," which was the corner of 1000 West and 500 South. R. 226:26, 36; State's Exhibit 7. When the car stopped, it was "[n]ot that close" to her. R. 226:27. It was about as far from her as the back of the courtroom was as she testified. Id. at 38. She did not want to get any closer to the car and she started thinking about crossing 500 South or getting away. Id. at 37. Then, the man "reach[ed] over to the backseat," opened the "right-back door," and "yelled, 'Get in'" or "'Get in the car,'" in "a demanding way." Id. at 26-28, 39-40. Poike "felt scared" and "ran across" 500 South and into the alley just east of the house at 965 West 500 South. Id. at 28; State's Exhibit 7. There, she "saw a car at the end of the alley." R. 226:29, 41. She did not "know if it was [the same] car," but she thought it might be, so she ran to the house at 965 West 500 South, which was her friend's house. Id. at 29-30, 41; State's Exhibit 7. Her "friend's grandma opened the door" and she "stay[ed] outside as [her friend's grandmother] called the police." R. 226:30.

Lloyd Ferguson, who lived directly across the street to the south of the Tot Lot Park at 937 West 500 South, witnessed Poike's encounter with the man from his front

porch. Id. at 76; State's Exhibit 7. Ferguson said he saw Poike walking west on 500 South "with her dog." R. 226:76, 79. A man in a car headed east stopped "right there in front of [his] house" and spoke to Poike. Id. at 76-77, 79. Poike looked at the man, shook her head, and "kept on walking." Id. at 77, 79-80. The man in the car "flipped" a U-turn so he was driving west on the same side of the street as Poike, drove passed Poike and the stop-ahead sign, and stopped at the stop sign at the corner of 1000 West and 500 South. Id. at 77, 81-82; State's Exhibit 7. The man "kept looking back," possibly "in the rear view mirror." R. 226:82. Ferguson could not hear what was going on, but he never saw the man turn his head or body around or open the car door. Id. at 83-84. Poike reached the stop-ahead sign "directly across the street from the house" at 965 West 500 South and, "the next thing you know, she runs across the street" right "where the driveway is." Id. at 77, 83; State's Exhibit 7. The man in the car then "turned the corner" and "almost wiped out another car when he was turning the corner to take off." R. 226:77.

Deanna Talbott, the grandmother of Poike's friend who lived at 965 West 500 South, testified Poike came "pounding on the door" of her granddaughter's house, opened the door, and entered before she even "got off the couch." Id. at 48, 53. Poike was "hysterical." Id. at 48, 53-54. She was crying and shaking and her voice was strained. Id. at 49. She told Talbott she had been walking by the Tot Lot Park with her dog when:

> [a] man pulled over and said, 'Get in the car.' She kept walking, and she was going across the street from my granddaughter's house, and he opened the door, the back door

> on the passenger side, and told her to get in, and she didn't. She run across the street, and she was going to go down the alley that goes down alongside my granddaughter's house. And she saw him go by the other end of the block, so she come running—that's when she came in the house.

Id. at 49-50; see id. at 54-55.

Officer Joseph Schirle, who responded to Talbott's call, arrived about ten minutes later. Id. at 31, 56, 86. He said Poike described the man "as having black hair" in "a Mohawk style." Id. at 41. He drove her to look at a suspect and she identified Reed as the man in the car. Id. at 31-32, 86-87. Officer Catherine Schoney interviewed Poike on August 13 and August 16. Id. at 58. She said Poike again described the man as having black hair and a Mohawk. Id. at 42, 68.

Officer Schoney also interviewed Reed on August 12. Id. at 59. At the time, Reed had blond, greased-back hair. Id. at 60, 70; State's Exhibits 2, 3; Defendant's Exhibit 4-b. Initially, Reed said he did not "know anything about" the case. R. 226:62. After more questioning, Reed said he "pulled over," but "did not talk to [Poike]." Id. at 63. He "thought of exposing [him]self," put his hand "down at [his] zipper," and "yelled, 'Hey,'" to "get her attention." Id. at 63-64, 68. He then "stopped" and "circled around the block to do it again." Id. He stopped the car "a block" ahead of her. Id. Then Poike "took off" so he "took off" and "just left." Id. at 63-64, 66. When Officer Schoney asked Reed whether he opened the car door and told Poike to get in, he said, "'No, no, I did not. I swear to God I did not open the car door and tell her to get in.'" Id. at 64. Thereafter, he repeatedly denied opening the car door or telling Poike to get in and offered to take a polygraph test to prove it. Id. at 65, 69. When asked why Poike would say he opened the

door and told her to get it, Reed said, "'Maybe she's scared. Maybe she wants me arrested for sure, but, no.'" Id. at 71-72.

Detectives Cody Lougy and David Harris impounded and searched the car, which belonged to Reed's girlfriend, Rebecca Fehse. Id. at 91; R. 227:30-31. The State called Detective Harris as a rebuttal witness after the defense rested. R. 227:29. Detective Harris testified that during the impound search he found a knife and a canister of mace or pepper spray. Id. at 32. He also found a baseball bat "[o]n the floor of the car behind the front seat." Id.

B. Evidence Presented By the Defense:

Reed took the stand and admitted he had been convicted of providing false information to a police officer in 1999. R. 226:101. He then testified that on the afternoon of August 12, 2004, he had the blond, greased-back hairstyle depicted in State's Exhibits 2 and 3 and Defendant's Exhibit 4-b. Id. at 100-01. That day, he was job-hunting in Fehse's car and was "in a fairly good mood." Id. at 101, 119, 122. He did not drive Fehse's car often, but he kept some clothes in the trunk. Id. at 125. Fehse kept a baseball bat and a can of mace in the car for protection. Id. at 123. He did not recall any towels in the backseat. Id. at 124.

While job-hunting, Reed "got kind of lost" in the vicinity of 900 West and 500 South. Id. at 101. As he was driving east on 500 South, he saw Poike walking west with her dog and "pulled off the side of the road." Id. at 102-03. Looking for a thrill or a rush, he decided to expose himself to her. Id. at 119. He shifted so his "belt line was above the door," put his "hand on [his] belt buckle and the tip of [his] zipper between

[his] fingers," and "said, 'Hey.'" Id. at 104-05. He did not pull the zipper down. Id. Poike "glanced at" him briefly and kept walking. Id. at 105. Because Poike ignored him, Reed did not get the thrill or rush he was seeking. Id. at 119.

Reed "flipped a U-turn" and "drove west down the street . . . a block and a half, to the stop sign" at 1000 West and 500 South. Id. at 105; State's Exhibit 7. He stopped at the stop sign for ten to fifteen seconds to check "the street signs trying to find out exactly where [he] was." R. 226:106. He also "glanced in [his] mirror a couple of times just to see if there was any traffic behind [him]." Id. He thought about trying to expose himself to Poike again, but he "realized it was a bad idea" and decided not to. Id. at 106-07. While looking in his rearview mirror, he saw Poike, who was "about half to three quarters" up the block, "run across the street." Id. at 107. Reed denied opening a car door or ordering Poike to "Get in" or "Get in the car." Id. at 107-08.

On cross-examination, Reed admitted his "forthrightness" during his interview with Detective Schoney "was pretty gradual." Id. at 109. During the interview, he initially denied knowing anything about the encounter, but then gradually admitted he saw Poike, pulled over, and attempted to expose himself to her. Id. at 109-10. He also admitted he circled the block to try to expose himself to her again. Id. at 110-13, 116. At the time he testified, Reed did not remember going around the block. Id. at 111-13, 116-18. He said he may have told Detective Schoney he circled the block because he "was upset and was being drilled with questions." Id. at 116-18. During his interview with Detective Schoney, Reed consistently denied opening the car door and telling Poike to get in the car. Id. at 112, 126. He knew telling a child to get in his car "would not be

looked at as anywhere the same kind of thing as a simple flashing." Id. at 114. He told Detective Schoney that he felt stress about losing his job and that stress "was enough" to make him "go a little bit psycho." Id. at 120-21, 125. Occasionally, he felt "so stressed out and rejected" that he thought about "hurting somebody." Id. at 121.

Fehse testified she was Reed's fiancé and she and Reed had one son together. R. 227:22. On August 12, 2004, she owned the car depicted in State's Exhibit 4-a. Id at 23. She kept shoes and towels in the car. Id. She also left a baseball bat under the driver's seat, and a knife and some pepper spray in the glove box as weapons. Id. at 24. She usually kept the bat in the trunk, but moved it under the seat in August or September after two incidents where she was threatened in her car. Id. On cross-examination, Fehse said she loved Reed enough to overlook the charged incident. Id. at 25.

SUMMARY OF ARGUMENT

This Court will reverse the jury's verdict in a criminal case when it concludes as a matter of law that the evidence was insufficient to warrant conviction. It will view the evidence in a light most favorable to the jury verdict and reverse if the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. Here, the marshaled evidence was insufficient to prove the substantial step element of attempted child kidnapping.

To prove Reed engaged in conduct constituting a substantial step toward the commission of child kidnapping, the State had to show his conduct strongly corroborated either his intent to commit child kidnapping or that he acted with an awareness that his conduct was reasonably certain to result in child kidnapping. The marshaled evidence,

however, was so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that Reed's conduct constituted a substantial step toward the commission of child kidnapping. It is unreasonable to conclude that by opening the car door and saying "Get in," Reed intended to induce or acted knowing his conduct might reasonably result in inducing a 12-year-old girl to abandon her plans and her large dog and run half a city block past six neighbors' houses to get into a stranger's car. Rather, as we know from his opening statement and from his testimony, the evidence suggests Reed's intent was not to commit child kidnapping, but to get a rush or a thrill by frightening Poike into running away.

ARGUMENT

THIS COURT SHOULD REVERSE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT REED WAS GUILTY OF ATTEMPTED CHILD KIDNAPPING

This Court will "reverse the jury's verdict in a criminal case when" it concludes "as a matter of law that the evidence was insufficient to warrant conviction." State v. Gonzales, 2000 UT App 136,¶10, 2 P.3d 954 (citations omitted). It will "view the evidence in a light most favorable to the jury verdict," and "will reverse only if the evidence is so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" Id. (citations omitted). Though the burden of establishing insufficiency of the evidence "is high," however, "it is not impossible." Id. (citations omitted). This Court "will not make speculative leaps across gaps in the evidence." Id. (citations omitted). "Every element of the crime charged must be proven beyond a reasonable doubt." Id. (citation omitted). In

other words, "[t]o affirm the jury's verdict," this Court "must be sure the State has introduced evidence sufficient to support all elements of the charged crime." Id. (citation omitted); see also Holgate, 2000 UT 74 at ¶18; State v. Leleae, 1999 UT App 368,¶17, 993 P.2d 232.

To succeed on a claim of insufficient evidence, the defendant "'must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" State v. Boyd, 2001 UT 30,¶13, 25 P.3d 985 (citations omitted). Proper marshaling requires the appellant to present "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (emphasis in original). "After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence." Id.

When reviewing the marshaled evidence, this Court will "not sit as a second trier of fact." Boyd, 2001 UT 30 at ¶16. """It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses."""" Id. (emphases and citations omitted); see State v. Workman, 852 P.2d 981, 984 (Utah 1993) ("When the evidence presented is conflicting or disputed, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence."). Thus, "[s]o long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, [this Court's] inquiry stops." Boyd, 2001 UT 30 at ¶16; see State v. James, 819 P.2d 781, 784 (Utah

1991) (noting mere existence of conflicting evidence does not warrant reversal). Instead, this Court will simply "'assume that the jury believed the evidence supporting the verdict.'" Boyd, 2001 UT 30 at ¶16 (citation omitted); see State v. Chaney, 1999 UT App 309,¶30, 989 P.2d 1091 ("We may not weigh evidence or assess witness credibility, but instead 'assume that the jury believed the evidence and inferences that support the verdict'" (citation omitted)).

In this case, Reed raised his motion to dismiss for insufficiency of the evidence at the close of the State's case-in-chief. R. 226:94. Thus, this Court should consider only the evidence raised by the State in its case-in-chief when deciding whether there was sufficient evidence to support Reed's conviction. See State v. Hamilton, 2003 UT 22,¶40, 70 P.3d 111 ("'A defendant's motion to dismiss for insufficient evidence at the conclusion of the State's case in chief requires the trial court to determine whether the defendant must proceed with the introduction of evidence in his defense.'" (citations omitted); State v. Kihlstrom, 1999 UT App 289,¶9, 988 P.2d 949 (limiting review of sufficiency of evidence in "appeal focuse[d] on the denial of the motion to dismiss at the close of the State's case-in-chief . . . to the evidence adduced by the prosecution in its case-in-chief," and holding "evidence presented by the defendant . . . [is] not relevant to our inquiry"); State v. Taylor, 818 P.2d 561, 573-74 (Utah Ct. App. 1991) (finding prima facie case based on facts established at close of State's case-in-chief). Accordingly, the marshaled evidence is as follows:

1. On August 12, 2004, twelve-year-old Poike was walking her dog west along the north sidewalk of 500 South. R. 226:22-23; State's Exhibit 7. She was walking to

Franklin Elementary School. Id. at 23. Lloyd Ferguson, who lived directly across the street to the south of the Tot Lot Park at 937 West 500 South, saw Poike walking west on 500 South "with her dog." Id. at 76, 79; State's Exhibit 7.

2. Poike's dog was a "pretty big" "golden retriever-mutt mix." R. 226:44, 48.

3. When Poike was walking past the Tot Lot Park, located on the northeast corner of Post Street and 500 South, she saw a four-door car parked across the street facing the same direction she was. Id. at 24-25, 33, 36; State's Exhibit 7. There was one person in the car and he was sitting in the driver's seat. R. 226:25, 27. The passenger-side window was the only window rolled down. Id. at 34. The man "yelled out, 'Hey,'" "lift[ed] himself up," and started "playing with" the zipper on his pants. Id. at 25, 33-34. When Poike saw this, she "got scared," "looked away," and "kept walking." Id. at 25-26, 35.

4. Ferguson saw a man in a car headed east stop "right there in front of [his] house" and speak to Poike. Id. at 76-77, 79. Ferguson said Poike looked at the man, shook her head, and "kept on walking." Id. at 77, 79-80.

5. Poike said she walked past the Tot Lot Park, across Post Street, and "a bit" farther. Id at 36; State's Exhibit 7. The man drove past her on the same side of the street as she was on and stopped at "the next corner," which was the corner of 1000 West and 500 South. R. 226:26, 36; State's Exhibit 7. When the car stopped, it was "[n]ot that close" to her. R. 226:27. It was about as far from her as the back of the courtroom was as she testified. Id. at 38.

6. Ferguson said the man in the car "flipped" a U-turn so he was driving west on the same side of the street as Poike, drove passed Poike and the stop-ahead sign, and

stopped at the stop sign at the corner of 1000 West and 500 South. Id. at 77, 81-82; see State's Exhibit 7.

7. Poike said she did not want to get any closer to the car and she started thinking about crossing 500 South or getting away. R. 226:37. Then, the man "reach[ed] over to the backseat," opened the "right-back door," and "yelled, 'Get in'" or "'Get in the car,'" in "a demanding way." Id. at 26-28, 39-40. Poike "felt scared" and "ran across" 500 South and into the alley just east of the house at 965 West 500 South. Id. at 28; State's Exhibit 7. There, she "saw a car at the end of the alley." R. 226:29, 41. She did not "know if it was [the same] car," but she thought it might be, so she ran to the house at 965 West 500 South, which was her friend's house. Id. at 29-30, 41; State's Exhibit 7.

8. Ferguson said the man "kept looking back," possibly "in the rear view mirror." R. 226:82. Ferguson could not hear what was going on, but he never saw the man turn his head or body around or open the car door. Id at 83-84. Poike reached the stop-ahead sign "directly across the street from the house" at 965 West 500 South and, "the next thing you know, she runs across the street" right "where the driveway is." Id. at 77, 83; State's Exhibit 7. The man in the car then "turned the corner" and "almost wiped out another car when he was turning the corner to take off." R. 226:77.

9. Poike said Talbott "opened the door" and she "stay[ed] outside as [Talbott] called the police." Id. at 30.

10. Talbott said Poike pounded at the door, opened the door, and entered before she even "got off the couch." Id. at 48, 53. Poike was "hysterical." Id. at 48, 53-54. She was crying and shaking and her voice sounded strained. Id. at 49. Poike said she had

been walking by the Tot Lot Park with her dog when:

> [a] man pulled over and said, 'Get in the car.' She kept walking, and she was going across the street from my granddaughter's house, and he opened the door, the back door on the passenger side, and told her to get in, and she didn't. She run across the street, and she was going to go down the alley that goes down alongside my granddaughter's house. And she saw him go by the other end of the block, so she come running—that's when she came in the house.

Id at 49-50; see id. at 54-55.

11. Officers Schirle and Schoney said Poike described the man "as having black hair" in "a Mohawk style." Id. at 41, 42, 68. Officer Schirle drove Poike to look at a suspect and she identified Reed as the man in the car. Id. at 31-32, 86-87.

12. Officer Schoney said Reed had blond, greased-back hair as depicted in State's Exhibits 2 and 3, and Defendant's Exhibit 4-b. Id. at 60, 70; State's Exhibits 2, 3; Defendant's Exhibit 4-b.

13. Officer Schoney interviewed Reed on August 12 and said Reed initially claimed he did not "know anything about" the case. R. 226:62. After more questioning, Reed said he "pulled over," but "did not talk to [Poike]." Id. at 63. He "thought of exposing [him]self," put his hand "down at [his] zipper," and "yelled, 'Hey,'" to "get her attention." Id. at 63-64, 68. He then "stopped" and "circled around the block to do it again." Id. He stopped the car "a block" ahead of her. Id. Then Poike "took off" so he "took off" and "just left." Id. at 63-64, 66.

14. Officer Schoney said that when she asked Reed whether he opened the car door and told Poike to get in, he said, "'No, no, I did not. I swear to God I did not open

the car door and tell her to get in.'" Id. at 64. Thereafter, he repeatedly denied opening the car door or telling Poike to get in and offered to take a polygraph test to prove it. Id. at 65, 69. Officer Schoney said that when she asked Reed why Poike would say he opened the door and told her to get in, Reed said, "'Maybe she's scared. Maybe she wants me arrested for sure, but, no.'" Id. at 71-72.

15. Detective Cody Lougy impounded and searched the car, which belonged to Reed's girlfriend, Rebecca Fehse. Id. at 91.

This evidence is insufficient to establish attempted child kidnapping.

> An actor commits child kidnapping if the actor intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian, or the consent of a person acting in loco parentis.

Utah Code Ann. § 76-5-301.1(1) (2003).

> (1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:
> (a) engages in conduct constituting a substantial step toward commission of the crime; and
> (b)(i) intends to commit the crime; or
> (b)(ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.
> (2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor's mental state as defined in Subsection (1)(b).

Utah Code Ann. § 76-4-101 (Supp. 2005).

"In order for conduct to constitute a substantial step, there must be more than mere preparation." State v. Johnson, 821 P.2d 1150, 1157 (Utah 1991). Rather, conduct

constitutes a substantial step only "if it strongly corroborates the actor's mental state as defined in Subsection (1)(b)" of the attempt statute. Utah Code Ann. § 76-4-101(2). For example, in Johnson, the evidence showed the defendant "purchased counterfeit crank from undercover officers," but did not show "what she did or attempted to do with it." Johnson, 821 P.2d at 1157. Since there was no evidence that she actually "attempted to administer the substance" to her husband, the evidence did not establish the substantial step needed to support a conviction for attempted first degree murder of her husband. Id.

Alternatively, in State v. O'Brien, 2003 UT App 419, 2003 Utah App. LEXIS 264, the defendant was illegally armed and driving a stolen vehicle, he led the officer on a high-speed chase, a shot was fired from inside the vehicle he was driving, he emerged from the vehicle holding a handgun and ran from the officer on foot, he sang a song about killing cops with handguns when he was apprehended, and the investigation revealed a bullet hit the officer's windshield at throat level. O'Brien, 2003 Utah App. LEXIS 264 at *3-*4. This Court held these facts established the substantial step needed to support a conviction for attempted aggravated murder of the officer. Id. at *3.

Similarly, in West Valley City v. Decker, 2000 UT App 97, 2000 Utah App. LEXIS 221, the defendant "removed some photographs from the City's file and hid them between two telephone books." Decker, 2000 Utah App. LEXIS 221 at *1. The defendant "later picked up the telephone books and left the building, unaware that City employees had retrieved the photographs." Id. This Court held these facts established the substantial step needed to support a conviction for attempted theft of the photographs. Id. at *1-*2; see Tillman v. Cook, 855 P.2d 211, 220 (Utah 1993) (holding evidence that

defendant set mattress ablaze, firefighter saw nothing on mattress to prohibit spread of flames, and arson investigator said mattress fire could destroy building, established substantial step to support use of attempted aggravated arson as aggravating circumstance); State v. Hickman, 779 P.2d 670, 672 (Utah 1989) (holding defendant's entry into home with sawed-off shotguns established substantial step needed for attempt element of aggravated robbery); State v. Cantu, 750 P.2d 591, 593-94 (Utah 1988) (holding evidence that defendant accosted victim with knife and club and demanded to know where she kept her silver and gold established substantial step needed for attempt element of aggravated robbery); State v. Gutierrez, 714 P.2d 295, 295-96 (Utah 1986) (holding evidence that defendant had his head under hood of truck he did not own, walked away when confronted, returned with drawn knife, demanded that victim hand over keys, ordered victim to lie on ground, and "slashed" at victim when he refused, established substantial step needed for attempt element of aggravated robbery); State v. Lemons, 844 P.2d 378, 381 n. 3 (Utah Ct. App. 1992) (noting evidence that defendant aimed shotgun for five to seven seconds before firing at victim established substantial step needed for attempted criminal homicide).

In this case, to prove beyond a reasonable doubt that Reed "engage[d] in conduct constituting a substantial step toward commission of" child kidnapping, the State had to show his conduct "strongly corroborate[d]" either his intent to commit child kidnapping or that he acted "with an awareness that his conduct was reasonably certain" to result in child kidnapping. Utah Code Ann. § 76-4-101(1)(b), (2). A defendant acts with intent to commit the crime when it is his "conscious objective or desire" to commit the crime.

Utah Code Ann. § 76-2-103(1) (2003). A defendant acts knowingly, as defined by the attempt statute, "when causing a particular result is an element of the crime" and "he acts with an awareness that his conduct is reasonably certain to cause that result." Utah Code Ann. § 76-4-101(1)(b)(ii); see Utah Code Ann. § 76-2-103(2). Thus, the State had to prove Reed's conduct "strongly corroborate[d]" either his "conscious objective or desire" to seize, confine, detain, or transport Poike without authority of law or the consent of her parents, or that he acted "with an awareness that his conduct was reasonably certain" to result in seizing, confining, detaining, or transporting Poike without authority of law or the consent of her parents. See Utah Code Ann. § 76-2-103(1)-(2); Utah Code Ann. § 76-4-101(1)(b); Utah Code Ann. § 76-5-301.1(1). The marshaled evidence, however, was "so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt'" that Reed's conduct constituted a substantial step toward child kidnapping. Gonzales, 2000 UT App 136 at ¶10 (citations omitted).

It is questionable whether Reed actually opened the car door and said "Get in," as Poike claimed. At trial, Poike remembered very few details about the car; she could not recall exactly what Reed said when he opened the door; her testimony about the direction the car was facing was unlikely and was contradicted by Ferguson; her testimony that Talbott opened the door for her and she stayed outside while Talbott called the police was contradicted by Talbott; she described Reed's hair as a black Mohawk, even though his hair was blond and greased back; and her testimony that the man told her to get into the car only the second time he stopped was inconsistent with her previous statements. R. 226:24-28, 30, 33-34, 36, 39-42, 48-50, 53-55, 68, 76-77, 79; State's Exhibits 2, 3;

Defendant's Exhibit 4-b. Collectively, this evidence suggests Poike's memory may have been tainted by the stress of the encounter, causing her to recall the encounter as worse than it actually was. See State v. Long, 721 P.2d 483, 488-89 (Utah 1986) ("Contrary to much accepted lore, when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly."). Thus, Poike's testimony that Reed opened the car door and told her to "Get in" is questionable, especially since it was directly contradicted by Ferguson, who was not under the same stress as Poike and who never saw Reed turn around or open the car door. R. 226:83-84.

Even assuming Reed opened the car door and said "Get in," however, it is not reasonable to conclude this conduct strongly corroborated that Reed intentionally or knowingly acted to commit child kidnapping. See Utah Code Ann. § 76-2-103(1)-(2); Utah Code Ann. § 76-4-101(1)-(2); Utah Code Ann. § 76-5-301.1(1). Reed said during his opening statement and during his testimony that his intent during the encounter was not to kidnap Poike, but to get a thrill or a rush by startling her. R. 226:17, 119. The marshaled evidence strongly corroborates this intent, rather than the mental state required by the attempt statute. See Utah Code Ann. § 76-4-101(1)-(2).

All of Reed's actions were counterproductive to kidnapping. He selected a neighborhood full of people, at least one of whom was on a front porch watching, and at least occasional cars. R. 226:23, 29-30, 41, 76-77; State's Exhibit 7. He was directly across the street from Poike the first time he stopped, but, according to Poike's testimony, he did not induce her to get into the car then. R. 226:24-25, 33, 36. Instead, he tried only to expose himself to her. Id. at 25-26, 35. Reed then made a U-turn, bringing himself

right next to Poike, but he did not stop or induce her to get into the car then either. R. 226:26, 36, 77, 81-82. Instead, he drove right past Poike and kept driving until he reached the stop sign at the end of the block, thereby putting six houses (three on either side of the street) between him and his intended victim, and increasing the likelihood that people in the intersection would witness or interrupt the supposed kidnapping. Id. at 26-27, 36, 38, 77, 81-82; State's Exhibit 7.

More important, for Reed to have committed child kidnapping from his position at the end of the block, as he was charged with attempting to do, he would have had to induce Poike to abandon her plans and her "pretty big" dog; run half a city block past six houses, at least one of which belonged to a friend of hers; and get into his vehicle without crying out or otherwise drawing attention to herself. R. 226:26, 29-30, 36, 41, 44, 48, 77, 81-83; State's Exhibit 7. Such a feat would have required Reed, at the very least, to get out of the car, display some kind of force or weapon, or otherwise threaten or chase Poike. See Johnson, 821 P.2d at 1157 (holding evidence insufficient to establish substantial step toward first degree murder where evidence showed defendant purchased counterfeit crank but did not show she attempted to administer it to her husband). Any of these actions may have represented a substantial step because they would have strongly corroborated that Reed actually intended to commit or was acting with an awareness that his conduct was reasonably certain to result in child kidnapping. See Utah Code Ann. § 76-4-101(1)-(2). But Reed did none of these things. R. 226:26-28, 39-40, 83-84.

Instead, according to Poike, Reed simply opened the car door and said "Get in." Id. This did not constitute a substantial step because Reed knew his actions were not

going to induce a 12-year-old girl to abandon her plans and her dog and run half a city block past six neighbors' houses to get into a stranger's car. R. 226:26, 29-30, 36, 41, 44, 48, 77, 81-83; State's Exhibit 7. Rather, as asserted by Reed in his opening statement and his testimony, the evidence suggests he was just trying to get a rush or a thrill. R. 226:17, 119. Poike did not give him the reaction he was seeking when he tried to expose himself to her—she just ignored him and kept walking. Id. Consequently, he tried again and this time used an approach more likely to get the reaction he intended. Id. By opening the car door and saying "Get in," he caused Poike to do exactly what he wanted her to do—become frightened and run away, thereby giving him the thrill he was seeking. Id. at 17, 28, 77, 83, 119.

Thus, this Court should reverse Reed's conviction for attempted child kidnapping because there was insufficient evidence to support the conviction. Instead, this Court should enter a conviction for attempted lewdness involving a child, a class B misdemeanor, in violation of Utah Code Ann. § 76-9-702.5 (2003) and Utah Code Ann. § 76-4-101.

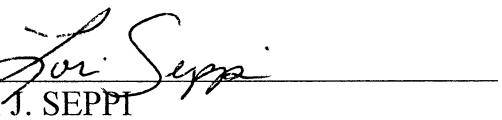
> If... an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense... the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense....

Utah Code Ann. § 76-1-402(5) (2003). At trial in this case, Reed admitted he was guilty of attempted lewdness involving a child, and the trial court submitted attempted lewdness involving a child to the jury as a lesser-included offense. R. 179; 226:16.

CONCLUSION

Reed respectfully requests this Court to reverse his conviction for attempted child kidnapping, and to enter a judgment of conviction for the lesser-included offense of attempted lewdness involving a child.

SUBMITTED this 25th day of November, 2005.



LORI J. SEPPI
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 25th day of November, 2005.

Lori Seppi
LORI J. SEPPI

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 25 day of November, 2005.

ADDENDA

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 041905261 FS
DAVID CARL REED, Defendant.	:	Judge: DENNIS M FUCHS Date: July 26, 2005

Custody: Prison

PRESENT
Clerk: wendypg
Prosecutor: JOHNSON, JOHN K
Defendant
Defendant's Attorney(s): REMAL, LISA J

DEFENDANT INFORMATION
Date of birth: October 17, 1978
Video
Tape Number: Video Tape Count: 8-46

CHARGES

1. ATTEMPTED CHILD KIDNAPPING - 1st Degree Felony
Plea: Not Guilty - Disposition: 02/03/2005 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED CHILD KIDNAPPING a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than three years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 041905261
Date: Jul 26, 2005

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court grants defendant credit for time served.

SENTENCE FINE

Charge # 1 Fine: $25.00
Suspended: $0.00
Surcharge: $25.00
Due: $25.00

Total Fine: $25.00
Total Suspended: $0
Total Surcharge: $25.00
Total Principal Due: $25.00
Plus Interest

SENTENCE FINE SUSPENDED NOTE

Fine suspended other than the security fee.

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $500.00 Plus Interest
Pay in behalf of: LDA

The amount of Attorney Fees is to be determined by Board of Pardons.

SENTENCE TRUST NOTE

Case No: 041905261
Date: Jul 26, 2005

Trust to be supervised by the Board of Pardons. Defendant also ordered to pay for any Restitution Costs regarding counseling required by Victim.

Dated this 26 day of July, 2005.

DENNIS M FUCHS
District Court Judge

105

ADDENDUM B

witness.

MR. FISHER: No further witnesses, Your Honor. At this time the State would rest.

THE COURT: The State has rested.

Ms. Remal, are you ready to proceed?

MS. REMAL: I am. I would like to make a matter of record outside the presence of the jury, so I wonder if we could excuse them.

THE COURT: Let's take a five-minute recess, just enough time to get you comfortable before we bring you back in.

(Jurors exit the courtroom.)

THE COURT: Okay. Let the record reflect that the jurors are not present in the courtroom. The State has rested.

Ms. Remal?

MS. REMAL: Your Honor, I would move the Court to dismiss the case against Mr. Reed for insufficiency of evidence or lack of establishing a prima facie case at this point. I would, in support of that motion, would point to a couple of different things:

Number one, it appears to me that there are a number of inconsistencies in the various statements that Ashley Poike has made about the incident that occurred on August 12th. Number one is about the description of the defendant, and I would ask the Court to refer to State's Exhibit 2 and 3 and Defendant's Exhibit No. 4, which are photographs of Mr. Reed.

She described to Detective Schoney that the individual who she interacted with that day had black hair and a mohawk. I would observe in those photographs he appears to be mostly blond and not having a hairstyle that I would say is a mohawk.

Secondly, there are different variations about what she said about where it was that she crossed the street. It's my recollection that Ms. -- Ms. Talbott indicated that she told her that she had gotten up to the corner, almost to the corner, and came back. She indicated to us today that she was closer to the middle of the street as I recall. And Mr. Ferguson indicated he saw her cross right about the middle of that block.

There are apparently a couple of different statements about what statement the defendant or what things he said to her when he was parked in that first location closer to Mr. Ferguson's house. She indicated today that he said, "Hey," and that was all. According to Ms. Talbott, she indicated on that date that she said something about getting into the car at that time. I would submit that those kinds of inconsistencies do not support going forward with the case at this point.

Secondly, the charge, of course, is attempted child kidnapping. Attempt, of course, requires a substantial step be taken by an individual, and I would submit to the Court that even if taking the testimony of Ms. Poike in the light more

favorable to the State, that that statement was made and the car door was opened, that I do not believe that that's a substantial step to the accomplishment of child kidnapping, so for those reasons I would move to dismiss for insufficiency of evidence.

THE COURT: With regards to your first point, yes, there are inconsistencies, and but there are inconsistencies usually in every case. There's are inconsistencies with the fact that she said he had dark hair. I don't know why, but I do have testimony to the effect that she identified -- she was taken within a short amount of time to an individual stopped in a car, and a car that she identified -- well, she -- of a description that she had given, that she identified the defendant as the individual -- at least, I heard testimony from officers that this is the defendant, or this is the individual that she identified as the individual that committed these alleged acts. So I think the identification is good.

Yes, there is a discrepancy as to where she crossed the road and the direction of where the car was pointing, but I think those ares discrepancies that I think the jury is going to have to deal with, so I deny your motion based on those grounds.

Would you like to respond just so there's a record in regards to the dismissal, because the argument is there isn't a prima facie case in regards to the attempted kidnapping.

MR. FISHER: Well, I think Your Honor's --

THE COURT: Well, I think substantial step towards.

MR. FISHER: Yes. Your Honor has spelled out most points I would make.

With regard to the issue of substantial step, I think that the Court has to look at the overall circumstances, and that would include that we're talking about a young girl, we are talking about an attempt of a child kidnapping.

Whether throwing open a door and ordering an adult to get in would be a substantial step might get to the level of questioning that issue, but when you're talking about a 12-year-old frightened child, using a demanding tone after having -- particularly after having instilled fear into that child with the initial act or attempted act, I think that anybody would say that that would be a -- there would be a possibility that that child would respond to that command, be afraid. And taking the testimony at face value of throwing open the door and issuing that kind of a command would be a substantial step with a child.

THE COURT: Thank you.

Ms. Remal, I agree with the State, and I deny your motion. There being a child involved in this, I think that if I look at the testimony in the light most favorable to the State for purpose of dismissal, I think they have established a prima facie case.

The evidence I have is that your client opened the door and in a demanding voice ordered her to get in the car. If she had gotten in the car, even for an instant, that probably would have been a kidnapping. I think he made a substantial -- at least for the purpose of a prima facie case, the opening of the door, and he demanding that she get in is a substantial step towards the possibility of detaining her against her will or without any authority, so I'm going to deny your motion. I think that they have established a prima facie case. Okay. All right. Are you ready to proceed?

MS. REMAL: Yes.

THE COURT: Do you want to bring -- are you ready right away or do you need a break?

MS. REMAL: No, we're ready.

THE COURT: All right. Let's bring the jury back.

THE CLERK: Mr. Langdon, did we enter No. 5?

THE COURT: Yes, yes. That was the two vehicles, 4 and 5.

MR. FISHER: States 5 and 6 -- you're right, 4 and 5.

THE COURT: Yes, State's 4 and 5.

THE BAILIFF: Third district court is back in session, be seated.

THE COURT: Back on the recordl in State of Utah vs. David Carl Reed, 0914 ggg. Let the record reflect the jurors are back in the courtroom. Defense counsel and defendant is

ADDENDUM C

76-2-103. Definitions.

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

76-4-101. Attempt — Elements of offense.

(1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:

(a) engages in conduct constituting a substantial step toward commission of the crime; and

(b) (i) intends to commit the crime; or

(ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.

(2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor's mental state as defined in Subsection (1)(b).

(3) A defense to the offense of attempt does not arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be.

76-5-301.1. Child kidnapping.

(1) An actor commits child kidnapping if the actor intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian, or the consent of a person acting in loco parentis.

(2) Violation of Section 76-5-303 is not a violation of this section.

(3) Child kidnapping is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.